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FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.

DOCKET NO. 15-11

IGOR OVCHINNIKOV, ET AL
v.
MICHAEL HITRINOV, ET AL

Consolidated With

DOCKET NO. 1953(I)

KAIRAT NURGAZINOV, ET AL
v.
MICHAEL HITRINOV, ET AL

FILED

AUG 29 2016

Federal Maritime Commission
Office of the Secretary

**RESPONDENTS' RESPONSE TO COMPLAINANTS' BELATED
AND IMPROPER MOTION FOR LEAVE TO FILE A SUR-REPLY
TO RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS**

Pursuant to FMC Rules, 69, and 71, Respondents Empire Lines United and Michael Hitrinov hereby respond to Complainants' August 24, Motion for Leave to File a Sur-Reply to Respondents' Motion for Judgment on the Pleadings.¹ As shown below, Complainants have entirely failed both to meet one of the prerequisites to relief under the Rules, and to make any showing of "extraordinary circumstances" that might warrant grant of such a belated motion.

A. Complainants Have Failed To Meet A Condition Precedent To Relief.

Complainants' Motion for Leave to Sur-Reply is indisputably a *non-dispositive* motion, as it is not a "motion for a final determination of all or part of [this] proceeding." Rule 69(g).²

¹ By our count, this is at least Complainants' fourth attempt to file a sur-reply claiming extraordinary circumstances. None have been granted.

² Rule 69(g) provides as follows:

"For the purposes of these rules, *dispositive motion* means a motion for decision on the pleadings; motion for summary decision or partial summary decision;

Proceedings regarding such motion are thus governed by Rule 71, not Rule 70. Rule 71(a) mandates that (i) “[b]efore filing a non-dispositive motion, as defined in 502.69(g)[,] the parties *must* attempt to discuss the anticipated motion,” and (ii) “[t]he moving party *must* state within the body of the motion what attempt was made or that the discussion occurred and whether the motion is opposed.” Counsel for Complainants has repeatedly referred to these requirements as a “condition precedent” to relief.

Complainants do not aver within the body of the motion or otherwise that they made any attempt to confer prior to filing the Motion for Leave to Sur-Reply, and in fact they made no such effort. The first time the undersigned heard anything about this non-dispositive motion was as a copy recipient on the email filing with the Secretary of the FMC.

As Complainants have made no effort whatsoever to confer before filing the instant motion, it could, and should, be dismissed for failure to comply with the condition precedent expressly set forth in the FMC’s Rules. We go on, however, to show that even if the Presiding Officer were to overlook the requirement or if the Complainants were to re-file their motion after compliance with the Rules, Complainants have flat-out failed to provide any grounds that would justify exercise of the Presiding Officer’s discretion to provide relief in extraordinary circumstances.

B. Complainants Have Not Shown The Requisite Extraordinary Circumstances.

Complainants assert that they should be granted a discretionary opportunity to further extend this proceeding by filing, at no stated time, a sur-reply specifically limited to Appendices

motion to dismiss all or part of a proceeding or party to a proceeding; motion for involuntary dismissal; motion for initial decision on default; or any other motion for a final determination of all or part of a proceeding. All other motions, including motions related to discovery, are non-dispositive motions.”

A-D to Respondents Reply on Judgment on the Pleadings, and perhaps the Affirmation of Mr. Kapustin. Although Complainants have paid lip service to the requirement to show “extraordinary” circumstances, they have made scant effort to show even good cause, much less anything extraordinary. Even brief review shows that there are no such circumstances, and that this belated motion is simply another effort by Complainants to defer dismissal of their Complaint by distracting attention from their clear failure to show that they were shippers or consignees on the relevant shipping documents.

1. **Complainants’ Request is Extraordinarily Tardy.** The only thing “extraordinary” about the circumstances is how long the instant motion was filed after the pleading to which it seeks to respond.³ Respondents’ Reply was filed on July 26, yet Complainants did not find it necessary to seek leave to respond until August 24, a full 29 days later. Complainants’ proffer no excuse for this belated change of mind, and we can conjure none.⁴ Certainly, Complainants cannot claim as an excuse that Complainants’ Counsel was in Israel, as he previously misrepresented to the Presiding Officer. If Counsel was in Israel at all, he was back in this country no later than July 28, when he attended in the flesh a deposition in

³ It might also be considered extraordinary that the same Complainants who recently complained in vociferous fashion about the delay that might be engendered by allowing Mr. Kapustin to intervene, now seek to create quite similar delay.

⁴ We might speculate that the reason is that Complainants Counsel has, with the surprising assistance of plaintiffs’ counsel in the DNJ, recently planted documents regarding Mr. Kapustin in the DNJ proceeding, we assume as an excuse to cite them to the Presiding Officer. Such a filing, however, simply raises the question of whom Complainants’ Counsel is really representing, as Complainants’ interests are directly adverse to those of plaintiffs given that the Presiding Officer has stated that recovery by one necessarily reduces or eliminates recovery by the other.

Parties to Supplement the Record, and their August 15 Opposition to Mr. Kapustin's Motion to Intervene.

3. **There is no need for further briefing on this side issue.** Complainants have identified the focus of their requested sur-reply as the invoices from Global to other customers for the same cars claimed by Complainants. These invoices were recently provided to Empire by Global, and were furnished to the Presiding Officer and Complainants in precisely the form they were received from Global.⁷ Complainants allege that these documents were not produced in any litigation involving Global, which we cannot verify and which may or may not be true. In any event, Complainants' Counsel was Global's Counsel at that time, and so it was apparently he who chose not to produce them (and is thus in no position to claim surprise about what was in Global's records).

More importantly, as we have previously demonstrated in Respondents' Reply to Complainants' Response to the Presiding Officer's Order to Supplement the Record, purported invoices are at best a tangential sideshow to the issue of subject matter jurisdiction. Invoices are not shipping documents, and cannot be used to define the non-party carrier's transportation obligation. It is thus of no relevance whether there is one set of invoices, two sets of invoices, or hundreds of sets of invoices.⁸ Jurisdiction is determined only by the transportation contracts, which in this case pointedly exclude Complainants.

We further note that Complainants alleged "discrepancies" in the documents are of the same ilk as have been shown to exist in the invoices and supporting documents submitted by

⁷ We remind the Presiding Officer that Empire was unaware of any invoices, much less the invoices for these vehicles, until after Counsel for Global (now Counsel for Complainants) filed suit in the EDNY. That Complaint was served in May 2013, well after the three vehicles had been sold.

⁸ We note, moreover, that Global has produced yet another invoice to a party other than Complainants for one of the vehicles. Kapustin App. 22.

Complainants, including inter alia: (i) alleged purchase from entities that did not hold title to the vehicles, (ii) dates of sale considerably before Global had any ownership interest in the vehicles, (iii) inconsistencies between the Global entity identified by the invoices and those identified as the seller in signed statements by Complainants, (iv) multiple invoices with the exact same invoice numbers for different cars, and (v) oddities in the purported bank transfers from Complainants to Global, including one specifically identified as a "gift."

Moreover, as Complainants conveniently ignore, the invoices they submitted are subject to a pending motion to dismiss in the absence of electronic originals. It is ironic that the same Counsel who refuses to provide electronic originals of Complainants' invoices is the very same counsel who now wants to challenge similar invoices from Global. Complainants' Counsel has repeatedly postured about falsified documents with no effort to back up his claims, yet continues to rely upon and cite obviously falsified invoices purported to be from Empire.

In sum, there is no more reason to engage in still more briefing about meaningless "invoices" than there is regarding whether Mr. Kapustin or Mr. Nussbaum is the bigger liar. The Presiding Officer can simply ignore all purported invoices and rule, as he should, based on the actual transportation documents.⁹

C. Should The Presiding Officer Allow Further Filings, He Should Limit The Issues To Be Addressed And Provide Respondents An Opportunity To Respond

For the reasons stated above, the facts and arguments necessary to render a fully-informed decision on subject matter jurisdiction are already in the record, and the additional briefing requested by Complainants is simply superfluous. If, however, the Presiding Officer

⁹ Complainants' Counsel notes that he reviewed some 10,000 pages of documents in the EDNY proceeding. Obviously he did not find anything indicating that Empire had any transportation relationship with Complainants, or was even aware of them prior to the sale of the vehicles, as he surely would have produced them here.

should decide that some additional explication may be useful, we request that the Presiding Officer: (i) specify the issues that may be addressed, rather than allowing a free-for-all, and (ii) provide Respondents, who under the Rules are entitled to the last word, the fundamental fairness of a right to respond to Complainants' pleading.

Complainants have at most identified two matters for further briefing – the invoices attached to Respondents' Reply and the Kapustin Affirmation, as referred to therein. As shown above, the invoices are simply irrelevant to the issues at hand, and Complainants could, had they wished, have addressed them already, rather than wait 29 days and make a belated motion. If the Presiding Officer nevertheless offers Complainants, as they are fond of saying, another bite at the apple, it should be limited to the only issue they suggest – i.e., the veracity of the documents themselves. Likewise, Complainants have already availed themselves of several opportunities to address the Kapustin Affirmation. Should the Presiding Officer afford them one more chance, it should be limited to the specific paragraphs of the Kapustin Affirmation addressed in our Reply, as well as the specific points that Respondents supported by such references.

Finally, as noted in a previous filing, the Commission has zealously maintained the briefing structure set forth in its Rules, so that the party to which the Rules give the last word is entitled to keep that position. See, e.g., *Universal Fixture Manufacturing Co. v. ANERA*, 26 SRR 386, 387 (ALJ 1992); *Matson Navigation Co.—Hawaiian Cargoes*, 25 SRR 245, 246 (FMC 1989), each of which granted a motion for leave to reply, but also granted the party entitled under the Rules to the last word with the right to file a further reply, in order to maintain the structure set forth in the Rules. Accordingly, should the Presiding Officer allow Complainants to file any further reply, he should, in accordance with the Rules and fundamental fairness, allow Respondents their right to reply.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Respondents' Response to Complainants' Belated and Improper Motion for Leave to File a Sur-Reply to Respondents' Motion for Judgment on the Pleadings by email and first class mail to the following:

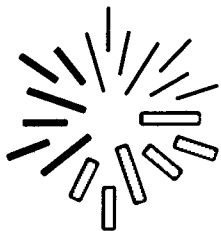
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Dated at Washington, DC, this 29th day of August, 2016.

A handwritten signature in black ink, appearing to read 'Anjali Vohra', written over a horizontal line.

Anjali Vohra
Counsel for Respondents



**NIXON
PEABODY**

RECEIVED

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August 29, 2016

VIA EMAIL AND FIRST CLASS MAIL

The Hon. Karen V. Gregory
Secretary of Federal Maritime Commission
800 North Capitol St.
Room 1046
Washington, D.C. 20573

Re: Docket No. 15-11 – Ovchinnikov v. Hitrinov


Dear Ms. Gregory:

Enclosed for filing in the above-captioned matter are an original true copy and five (5) additional copies of:

1. Respondents' Response to Complainants' Belated and Improper Motion for Leave to File a Sur-Reply to Respondents' Motion for Judgment on the Pleadings

If you have any questions, please do not hesitate to contact me.

Best regards,


Anjali Vohra

Enclosures